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IN THE

Supreme Court of the United States

October Term, 1957

No. 594

MORRIS O. ALFRIN,

Petitioner,

—against—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

F. JOSEPH DONOHUE
ABRAHAM S. GOLDSTEIN
503 D St., N.W.
Washington, D. C.

MICHAEL KAMINSKY
122 East 42nd St.
New York, N. Y.

Attorneys for Petitioner Alfrin

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UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Alprin prays that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on September 3, 1957. That judgment affirmed the conviction of petitioner and others of conspiracy to defraud the United States by impeding, impairing and obstructing the Treasury Department in its function of collecting income taxes (18 U.S.C. §371).

Citations to Opinions Below

The memorandum opinion of the District Court on the motions for judgment of acquittal is reported at 139 F. Supp. 135 and is printed at page 790 of the record on file

in this Court.* The opinion of the Circuit Court of Appeals is printed at pages 3a et seq. of the Appendix to this petition.**

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on September 3, 1957 (App. 3a). Rehearing was denied on October 3, 1957 (App. 29a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented†

1. Whether a prosecutor, planning to have a person indicted, may summon such a prospective defendant, by subpoena, to appear before the Grand Jury considering his indictment?

2. Whether, under the Fifth Amendment's prohibition of double jeopardy, a judgment of acquittal entered by the court at the end of the Government's case on a count charging a conspiracy with more than one objective bars further prosecution of a second count in the same indictment, which count charges a conspiracy having one of those objectives and involving the same persons pursuing that objective for eight of the eleven years involved in the first count?

3. Whether the trial judge may refuse to give content to the words "deceit, craft, trickery, or * * * dishonest

* References to the record will hereafter be made as follows: "R." will refer to the record; a Roman numeral to the volume of the record; and Arabic numerals to the appropriate pages of the record. The symbolic reference to the opinion mentioned above would, therefore, be R. II: 790.

** References to the Appendix will be prefaced by the designation "App."

† Alprin also adopts, and respectfully refers the Court to the additional arguments for grant of certiorari in the Klein and Haas petitions. Those points are not discussed here only in order to save the time of the Court.

means" by failing to instruct the jury how to determine whether an omission to report certain funds as income was lawful when said omission constituted one of the major forms of "concealment" by which petitioners allegedly defrauded the United States?

4. Whether, in a case where the trial judge concluded that there were three hypotheses, some antithetical, on which the jury could find some or all of the defendants guilty, he could properly refuse to treat them as proof of three conspiracies where only one is alleged and thus disregard what *Kotteakos* v. *United States*, 328 U.S. 750 (1946) requires of a charge to the jury in such circumstances?

Constitutional Provisions and Statutes Involved

FIFTH AMENDMENT

"* * * Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself * * *"

18 U.S.C. §371

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. * * *"

Statement of the Case

Petitioners were indicted in five counts. The first three counts alleged income tax evasion by Klein and charged the other defendants with aiding and abetting said evasion.

The fourth count charged conspiracy by the defendants and others, beginning in 1943 and continuing to 1954, to evade the income taxes of H. H. Klein, I. J. Klein, McLennan and Norgan (the last three being Canadians who did not appear at the trial) and, in addition, to conceal the nature and source of the income from the Harwood whiskey enterprise, out of which the taxes were allegedly owing. The fifth count charged the same defendants with a conspiracy continuing from 1946 to 1954 to defraud the United States by impeding Treasury in its tax collection function, the means being to conceal the nature and source of the income of the defendants from the Harwood enterprise.*

Before trial, petitioners Alprin and Haas moved to dismiss the indictment on the ground that they had been summoned before the Grand Jury considering their indictment by a prosecutor planning to have them indicted; and that this violated their right under the Fifth Amendment not to be compelled to be witnesses against themselves. The motion was denied by District Judge Palmieri, 124 F. Supp. 476 (S.D.N.Y. 1954) (R. I: 130), and the denial was affirmed below (App. 26a).

The government's evidence revolved principally around the negotiation of, and operations under, a contract between Agencias Destiladoras, a Cuban corporation, and E. C. Williams, a New York whiskey distributor, under which Williams was to purchase Harwood's Canadian Whiskey from Agencias "f.o.b. Vancouver" and was to distribute that whiskey in the United States. Alprin represented Klein at the negotiation of this contract, but he played virtually no part in the subsequent activities of

* What are referred to throughout as the fourth and fifth counts were actually the first and second counts of Indictment No. C-145-147 (R. I: 137 et seq.). These superseded counts four and five of C-144-144. The first three counts of the latter indictment (R. I: 25 et seq.) were consolidated for trial with the two counts of C-145-147.

Agencias or other Klein corporations. During the years 1944 to 1947, more than $20,000,000 in profit was earned by the Harwood enterprise, which ultimately grew to embrace some seventeen Cuban and Panamanian corporations. In 1947, those profits were distributed in equal parts to H. H. Klein, I. J. Klein, McLennan and Norgan, who were the owners in equal parts of the stock of the various corporations, with one exception—Tivoli Trading Co. The theory of the Government's case on the first three counts, charging income tax evasion, was that Klein's share of the Harwood enterprise was not capital gain but accumulated ordinary income—this because the corporations were sham and the profits had been earned by Klein and the three Canadians as joint venturers, whose profits should have been reported annually on an ordinary income basis.

Much of the evidence came in to prove the nature of these corporations and the control over them allegedly exercised by Klein. Other categories of evidence came into the case without limitation to any one count—dealing with entries in the books of the various corporations, transfer of monies from New York to Canada, etc. One of the principal of these clusters of facts revolved around the Tivoli Trading Co., which had been organized in April, 1945 by H. H. Klein (R. III: 1469-70, 1740). This evidence appears to have come in to prove the concealment of the nature and source of Harwood income, alleged as objects of both the fourth and fifth count conspiracies.

Alprin, Roer and Koerner testified that Klein had promised them he would reward their diligence in the Harwood cause by giving them an opportunity to invest in one of the companies (R. I: 232, 295, 368; IV: 2070). Such an investment was made in October, 1945 and checks made out by Alprin et al. to Tivoli attest to that fact (R. I: 231, 238, 295, 297; IV: 2088). The checks represented the first deposit in the Tivoli account (R. I: 585-7). Stock certificates were prepared for Alprin et al. but they were never

finally executed or issued (R. I: 649; III: 1485-7). Here the versions diverge. Alprin et al. say Klein told them he would hold the stock in trust for their benefit (R. I: 232, 295, 372, 374; IV: 2089). Klein says he returned the cash equivalent of their checks to them and in effect "purchased their subscriptions" (R. I: 650; III: 1487). In contradistinction to the position of Alprin et al. that they had purchased an interest in Tivoli which represented, in turn, an interest in the Harwood enterprise, Klein said he and the Canadians owned all of Tivoli, with Klein holding all the stock in his name (R. I: 647-8).

In any event, Alprin, Roer and Koerner formed Cuban corporations in May, 1946, in the expectation (based on Klein's assurances) that each corporation would become a Harwood distributor in some Latin-American country. One of Alprin's companies was La Economica Agencias; one of Roer's—Compania Exportadora Fernandina (R. I: 632-3).

In March, 1947, Tivoli Trading Co. was liquidated. Klein delivered to Alprin two bank drafts, each one made out to Economica. One was for Alprin and the other was for Koerner (according to Klein, the payment of Koerner's draft to Economica was at Koerner's request) (R. I: 234-5, 335; III: 1520-2). Roer received a draft made payable to Fernandina. Alprin, Roer and Koerner take the position that these payments were in liquidation of their stock interests in Tivoli and the Harwood enterprise (R. I: 231-2, 241, 308-9, 365). Klein and Rokoff say they were commission or bonus payments or perhaps a gift (R. I: 669; III: 1471, 1474, 1521).

Alprin and Roer said that the drafts were delivered to them by Klein, as President of Tivoli, with instructions not to use the drafts until they were released by him (R. I: 235, 237, 301, 313, 318, 365). Although Klein denied instructing them to hold the drafts, he said again and again, before Treasury and at the trial, that he "may"

have given Alprin et al. the impression that they were not to use the drafts (R. I: 662-5, 669, 672-4; III: 1527, 1792).

Roer's draft was released by Klein in early 1950, at which time he reported it in his income tax return for that year as a capital gain on his investment in Tivoli (R. I: 376-7). The Alprin and Koerner drafts were not released by Klein until February, 1952. Alprin immediately reported his draft as capital gain on the Tivoli investment (R. IV: 2130 et seq.).[1]

Alprin insisted that he held both his and Koerner's drafts as a trustee, pending notification by his client that they could be used. Until such notification came, he did not feel the money was his to use and hence not reportable as income. He, therefore, omitted the amount of the draft from his returns in the years 1947 to 1951. This was done upon the annual advice of Alprin's long time accountant and tax counsel, Haas, who informed him that funds received subject to a complete restriction on use were not taxable income until the restriction was removed (R. I: 313, 320, 342, 348, 492, 502).

Virtually all of the above came out on the Government's case because it consisted for the most part of the statements made by the defendants themselves to Treasury.

Based upon the Government's case, defendants moved for judgment of acquittal on all five counts of the indictment. That motion was granted as to the first four counts but denied as to the fifth. In his opinion on the motion, 139 F. Supp. 135 (R. II: 790), the trial judge concluded

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[1] In May, 1947, Alprin says that at Klein's direction, he deposited his draft in a Toronto bank. The funds were frozen there by the Canadian government until February, 1949 (R. I: 305-6, 321-2, 343; III: 1852-3; IV: 2112). Alprin, at Klein's direction, withdrew the money and held it in draft form in his office until notification of release by Klein (R. I: 344; IV: 2115). The Koerner draft was held by Alprin, or jointly by Alprin's designees and Koerner's designees, during the entire period (R. I: 304, 324, 505; III: 1880-1, 1927-8).

that the corporations comprising the Harwood enterprise were not sham and hence that the monies earned by H. H. Klein and the Canadians were properly reportable as capital gain, rather than ordinary income. He also concluded that the evidence did not support the allegations of the conspiracy charged in the fourth count—a conspiracy charging not only commission of the substantive offenses alleged in the first three counts but also concealment of the means of tax evasion and of the nature and source of the Harwood income. With regard to the fifth count, the trial judge concluded that it could go to the jury upon three hypotheses, under which some or all of the defendants could be found guilty—one involving Klein and Rokoff but not Alprin; a second involving Alprin, Roer and Koerner but not Klein and Rokoff; and a third involving all defendants.

The motion on the fifth count was denied by the Court, over the strong objection of defendants that, under principles of double jeopardy, the acquittal on the fourth count barred further prosecution on the fifth—since the latter was alleged to have as its objective the concealment of the nature and source of the Harwood income, an objective which the very same persons had just been found not to have conspired to attain when they were acquitted on the fourth count.

The case was eventually submitted to the jury on instructions which suffered from two basic defects: they did nothing to define the key issue as to Alprin—whether the holding because of the restriction on the use of funds held by him for four years was lawful and proper or in some way culpable. Nor did they articulate for the jury that it was, in practical effect, to treat the case as if three conspiracies had been alleged, each "hypothesis" being a separate conspiracy.

The Court below affirmed the judgment in the trial court in an opinion which it set out *infra* App. 3a.

REASONS FOR GRANTING THE WRIT

I.

When a person marked for prosecution is summoned to testify before the grand jury considering his indictment, his rights under the Fifth Amendment are violated.

At a time when petitioners Alprin and Haas were "prospective defendants"—"as close to being indicted as it is possible" to be (R. I: 109-10)—they were summoned before the grand jury by a prosecutor planning to secure their indictment (R. I: 66-7, 112).[2] They moved to dismiss the indictment which followed on the ground that there had been a violation of their right, under the Fifth Amendment, not to be compelled to be witnesses against themselves. The motion was denied in the District Court, 124 F. Supp. 476 (R. I: 130) and the denial was affirmed below (App. 26a).

This Court needs no instruction on the place held by the prohibition against self-incrimination among the barriers interposed between the individual and the power of the state. Born out of a reaction to the excesses of Star Chamber and its use of secret inquisition to compel persons to convict themselves out of their own mouths, the constitutional provision stands as a landmark to the conception of human dignity from which much of our law derives. See *Brown* v. *Walker*, 161 U. S. 591, 596 (1896). It is because of this Court's sensitivity to that history that it long ago concluded the Fifth Amendment is "as broad as the mischief against which it seeks to

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[2] See *United States* v. *Haas*, 126 F. Supp. 817, 818 (S.D.N.Y. 1954). Klein was not summoned and did not testify before the grand jury.

guard" *Counselman* v. *Hitchcock*, 142 U. S. 547, 562 (1892) and that it should be liberally construed to assure that that "mischief" is not revived in other forms.[3]

Turning to the case at hand, it is clear that petitioners Alprin and Haas were potential defendants[4] when they were haled before the grand jury considering their indictment. Had they been actual defendants called by the prosecution to testify at their own trial, there is no doubt whatever that reversible error would have been committed.[5] It seems equally without doubt that persons formally accused of crime may not be summoned to testify before a grand jury considering their indictment.[6] This is because testimony before the grand jury, equally with that before a petit jury, is testimony in a criminal case.[7] And in both instances, the purpose of the prosecutor cannot be other than to do the very thing against which the Fifth Amendment guards—to have persons suspected of crime assure their own indictment or conviction through admissions (or leads to testimony) extracted from them in an official setting under the sanction of official process.

It is in this context that the distinction between defendant and witness becomes critical. For while a mere

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[3] See, e.g., *Ullman* v. *United States*, 350 U.S. 422, 426 (1956); *United States* v. *White*, 322 U.S. 694, 698 (1944).

[4] Cf. *Grunewald et al.* v. *United States*, 77 S. Ct. Rep. 963, 979 et seq. (1957).

[5] This is true not only because of 18 U.S.C. §3481 but as a matter of constitutional law. See *United States* v. *Housing Foundation of America*, 176 F. 2d 665, 666 (3 Cir., 1949) and cases cited therein; 8 Wigmore, *Evidence*, §2268.

[6] The formal accusation may have been in a prior information or indictment relating to the same matter. See cases in note 9 infra; see also *United States* v. *Lawn*, 115 F. Supp. 674 (S.D.N.Y. 1953).

[7] *Counselman* v. *Hitchcock*, 142 U.S. at 562; *United States* v. *Monia*, 317 U.S. 424, 427 (1943).

witness is not likely to have incriminating questions put to him and hence may well be left to assertion of his right (or privilege) not to answer particular incriminating questions, *every* relevant question put to a defendant will tend to incriminate him. Judge Frank, concurring in *United States* v. *Scully*, 225 F. 2d 113, 118 (2 Cir., 1955); 8 Wigmore, *Evidence*, §2268, pp. 392-3.

But what of the person who, though not yet a defendant in name, is one in fact? May he be summoned to testify before the grand jury considering his indictment and there interrogated in a way which cannot but incriminate him? That is the issue posed squarely by this case, for Alprin and Haas were clearly marked for prosecution when they were summoned. The fact that their status as *de facto* defendants is demonstrable here and that the problem roots deep in the Fifth Amendment (and in the means of evading its strictures) make this a particularly appropriate case for certiorari. It affords an opportunity for this Court to clarify an issue which has recurred time and again in state and federal courts and which has never been authoritatively considered here.[8]

Four separate lines of authority have thus far been drawn upon by the parties here and by the courts below in seeking a solution to the problem. One group of decisions, relied upon by the District Judge below, makes the formal distinction between defendants and witnesses determinative. Under this view, anyone not yet formally named a defendant may be summoned before the grand jury, even though it is "probable that the grand jury would * * * subsequently indict" him. 124 F. Supp. at 478 (R. I: 131). Such a person has only the right of a witness

[8] State decisions arise under the state constitutional equivalents of the Fifth Amendment.

who may refuse to answer particular incriminating questions.[9]

A second group of decisions hold that one who is demonstrably a defendant in fact, even if not in name, may not be summoned at all. If he is summoned and sworn, the indictment against him will be quashed.[10]

There is a third body of case law which suggests a middle view. In substance, the view is that whatever error there may be in summoning before the grand jury persons who are defendants (*de jure* or *de facto*), it is cured if

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[9] See, e.g., *United States* v. *Benjamin*, 120 F. 2d 521, 522 (2 Cir., 1941); *Mulloney* v. *United States*, 79 F. 2d 566, 578-9 (1 Cir., 1935), cert. den. 296 U.S. 658 (1936); *United States* v. *Hirsch*, 74 F. 2d 215, 219 (2 Cir., 1934), cert. den. 295 U.S. 739 (1935); *O'Connell* v. *United States*, 40 F. 2d 201 (2 Cir., 1930), app. dismissed 296 U.S. 667; *United States* v. *Price*, 163 Fed. 904, 905 (2 Cir., 1908), aff'd 216 U.S. 488 (1910). Cf. *People* v. *Smith*, 241 N.W. 186 (Mich. 1932). In *Benjamin*, *Hirsch* and *Price*, the "witnesses" had been advised of their right to refuse to answer incriminating questions. See *infra*, pp. 12-13 and note 14. In *O'Connell*, there was no indication that he was anything more than a mere witness. The same was true in *United States* v. *Scully*, 225 F. 2d 113, 116 (2 Cir., 1955) and in the *Mulloney* case. With regard to *Mulloney*, much of its force has been lost as a result of Judge Magruder's opinion in *Maffie* v. *United States*, 209 F. 2d 225, 228-9 (1 Cir., 1954).

[10] *United States* v. *Edgerton*, 80 Fed. 374, 375-6 (D. Mont. 1897); *People* v. *Gillette*, 111 N. Y. Supp. 133, 135-6 (App. Div. 1908); *People* v. *Bermel*, 128 N. Y. Supp. 524, 525-6 (Sup. Ct. 1911); *People* v. *Luckman*, 297 N. Y. Supp. 616, 618-19 (Sup. Ct. 1937), aff'd in part, rev'd in part on other matters, 3 N.Y.S. 2d 864 (App. Div. 1938); *People* v. *Seaman*, 21 N.Y.S. 2d 917, 920 (Sup. Ct. 1940); *State* v. *Gardiner*, 92 N.W. 529, 533 (Minn., 1902); *State* v. *Rixon*, 231 N.W. 217, 218 (Minn. 1930); *State* v. *Smith*, 228 N.W. 240, 247 et seq. (S.D. 1929); *State ex rel. Poach* v. *Sly*, 257 N.W. 113, 117 (S.D. 1934); *State* v. *Caperton*, 207 S.W. 795, 796 (Mo., 1918); *State* v. *Naughton*, 120 S.W. 53, 58 (Mo., 1909); Cf. *Jenkins* v. *State*, 14 S.E. 2d 594, 596 et seq. (Ga., 1941); *Bradford* v. *Mills*, 66 S.E. 2d 58, 59 (Ga., 1951); *Culbreath* v. *State*, 113 So. 466 (Ala., 1927); *Taylor* v. *Commonwealth*, 118 S.W. 2d 140, 142 (Ky., 1938); *Boone* v. *People*, 36 N.E. 99, 101 (Ill., 1894); *Commonwealth* v. *Banc*, 39 Pa. D. & C. 664 (1940). See 3 Wharton, Criminal Evidence (11th ed.) §1140.

the testimony which follows was preceded by a warning that there was a right not to testify at all.[11] The warning presumably assures that the testimony elicited was truly a matter of the "defendant's" own choice. See note 14 *infra*.

The Court below added yet a fourth approach to the problem—one which seeks to ascertain whether the testimony elicited under subpoena was "freely given." If it was, then it apparently does not matter whether the person summoned to testify was a defendant in fact or in name. App. 26a. The Court concluded that petitioners did testify "freely" and, therefore, that they could have no objection to what transpired.

Considering first the "freely given" test, we submit that it is defective on both factual and legal grounds. Petitioners Alprin and Haas testified in response to subpoena. Such persons are not volunteers for they testify under threat of official sanction.[11a] In addition, once they have been summoned, their only alternative to testifying is to invoke the privilege against self-incrimination before the grand jury. Given their *de facto* defendant status, this means they must choose between (1) testifying, thereby perhaps assuring their indictment; or (2) invoking the privilege, thereby making their indictment fairly certain and, in addition, setting the stage for their impeachment if they should subsequently testify at the trial. Cf. *Grunewald* v. *United States*, 77 S. Ct. Rep. at 979 et seq.

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[11] As to de jure defendants, see *United States* v. *Lawn*, 115 F. Supp. 674 (S.D.N.Y. 1953) and cases cited therein. As to de facto defendants, see *United States* v. *Bell*, 81 Fed. 830, 840 (C. Ct. Tenn., 1897); *United States* v. *Edgerton*, 80 Fed. at 375-6. But see *United States* v. *Scully*, 225 F. 2d at 114-15.

[11a] See *Adams* v. *Maryland*, 347 U.S. 179, 181 (1954); *United States* v. *Minker*, 350 U.S. at 187; *Stillman* v. *United States*, 177 F. 2d 607, 618 (9 Cir., 1949); *United States* v. *Lawn*, 115 F. Supp. 674 (S.D.N.Y. 1953); *United States* v. *Miller*, 80 F. Supp. 979 (E.D. Pa., 1948); *Anno.*, 38 A.L.R. 2d 225, 300-301.

In such a context, summoning a person already marked for prosecution becomes a snare designed to invite assertion of the privilege before the grand jury, to his ultimate prejudice at the trial.

The "freely given" test suffers also from a confusion of two separate concepts. It reflects what both Justice Rutledge and Professor Wigmore have described as the "strange failure in the cases to discriminate between the rule of evidence [regarding the voluntariness of extra-judicial confessions] and the constitutional privilege [against self-incrimination]." *Wood* v. *United States*, 128 F. 2d 265, 268 (D.C. Cir. 1942); 8 Wigmore, *Evidence*, §2266, p. 387.[12] Unlike the rule of evidence which excludes only untrustworthy communications, the self-incrimination provision "protects against the force of the court itself. It guards against the ancient abuse of judicial inquisition. Before it judicial power, including contempt, to enforce the usual duty to testify, dissolves." 128 F. 2d at 268.

The decisions from which the "freely given" test derives are *Wilson* v. *United States*, 162 U.S. 613 (1896) and *Powers* v. *United States*, 223 U.S. 303 (1912).[13] Both were described by Judge Rutledge in *Wood* as based upon the rule of evidence, apparently because that was the only point argued to the Court. The Fifth Amendment point was neither raised nor decided. 128 F. 2d at 269. If the same problem were viewed from the vantage point of the Fifth Amendment, it is submitted that a different conclusion would be forthcoming, particularly when the official inquisition takes place in the secrecy of the grand

[12] The *Wood* case involved the admissibility in evidence of a plea of guilty entered before a committing magistrate under the Fifth Amendment without warning having been given the accused of his rights.

[13] Both were relied upon in *Block* v. *United States*, 88 F. 2d 618, 620 (2 Cir., 1937) which was cited by the court below. App. 26a.

jury room. See Judge Frank concurring in *United States* v. *Scully*, 225 F. 2d at 118, 119, in which he suggests reconsideration of *Wilson* and *Powers* by this Court.

Of all the approaches set forth above, the "freely given" test is least likely to check the abuse of official process by unduly zealous prosecutors and inquisitorial bodies. It depends too much upon after the fact reconstructions of events, and the rationalizations which attend them, rather than upon precautionary devices which check the abuse of official process at the very threshold.

The defendant-witness distinction, applied as formalistically as it was by the District Judge, is equally unsatisfactory. It leaves outside the protection of the Fifth Amendment persons who are defendants in fact, if not in name. It enables the prosecutor, merely by deferring a formal charge, to conduct an official inquisition, in the secrecy of the grand jury room, of the very person whose indictment he plans. The only purpose of such an inquisition is "to worm out of * * * [the potential defendant] all the self-incriminatory disclosures possible." *Maffie* v. *United States*, 209 F. 2d at 228-9; cf. *Powell* v. *United States*, 226 F. 2d 269, 274 (D.C. Cir., 1955); *United States* v. *Minker*, 350 U.S. 179. To make fundamental rights depend upon the whim of the prosecuting arm of government, through manipulation of the "defendant" category, is abhorrent to everything for which the Fifth Amendment stands. See *State* v. *Smith*, 228 N.W. at 247.

It is submitted that the best solution to the problem is the rule which the court in *United States* v. *Scully*, 225 F. 2d at 116, said was "a matter of ethics or fair play or policy" but which we submit is equally required by the Fifth Amendment: that a prosecutor should "in all cases refrain from calling as a witness before a Grand Jury any person who is *de jure* or *de facto* an accused."

The penalty for non-compliance should be dismissal of the indictment. Only such a clear-cut disciplinary rule can check the serious abuse of the Fifth Amendment which is illustrated in the present case.[14]

II.

Under principles of double jeopardy, a judgment of acquittal (because of insufficient evidence) entered by the court on one count bars further prosecution of the same offense charged in another count of the same indictment.

Because conspiracy is a crime which may continue over a long period of time, each new act pursuant to the original agreement extending its life, it affords a unique opportunity to the over-zealous prosecutor to frustrate the Fifth Amendment's prohibition of double jeopardy. By putting different beginning dates on, and attaching different overt acts to, parts of the one conspiracy, he make create the illusion that that is discrete which is, in law, continuous.

It is submitted that this is the case with the conspiracy charged in the fifth count, of which petitioners were convicted. It was not a separate conspiracy, but a part of

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[14] Another solution urged below and by no means waived here is that suggested by the third group of cases described *supra* pp. 12-13. Under those cases, an indictment will be quashed if testimony is elicited from a de facto defendant summoned before the grand jury, unless he has first been advised of his right under the Fifth Amendment not to testify at all. Alprin and Haas were given no such warning. Such a warning requirement has the virtue of easy administration; it analogizes the rights of a de facto defendant in a case initiated before the grand jury to those possessed by one arrested and brought before a committing magistrate. See Rule 5, *Federal Rules of Criminal Procedure*. It depends not upon assumptions about what may or may not be known to a particular individual but upon a rule applicable to all. Judge Frank concurring in *United States* v. *Scully*, 225 F. 2d at 117, note 1; *Wood* v. *United States*, 128 F. 2d at 277; *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938).

the larger conspiracy charged in the fourth count. When a judgment of acquittal was entered by the trial judge on the larger conspiracy, the lesser one should have fallen with it.[14a] Instead, the trial judge kept it alive upon the mistaken view that the identical facts can give rise to two conspiracies—one predicated upon the first half of 18 U.S.C. §371 and another upon the second half of that statute—and that this was so even though the count on which acquittal was ordered embraced both objectives.

His view was clearly wrong. There cannot arise out of one set of facts a conspiracy to commit an offense under 18 U.S.C. §371 and a conspiracy to defraud the United States under the same statute. This is not alone because 18 U.S.C. §371 creates one crime, not two. *May* v. *United States*, 175 F. 2d 994, 1002 (D.C. Cir. 1949), cert. den. 338 U. S. 830; *United States* v. *Manton*, 107 F. 2d 834, 838 (2 Cir., 1938), cert. den. 309 U. S. 664.[15] It follows also from the nature of conspiracy itself. Conspiracy is a continuing crime, the gist of which is the agreement. *Braverman* v. *United States*, 317 U.S. 49, 53 (1952). One agreement does not become more than one crime because it contemplates the doing of two or more acts,[16] or seeks

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[14a] *In re Snow*, 120 U.S. 274, 281-2 (1887); *In re Nielsen*, 131 U.S. 176, 187 (1889); *Short* v. *United States*, 91 F. 2d 614, 621 et seq. (4 Cir., 1937); *United States* v. *Cohen*, 197 F. 2d 26, 29 (3 Cir., 1952); *Manning* v. *United States*, 275 Fed. 29 (8 Cir., 1921); *United States* v. *Weiss*, 293 Fed. 992, 994 (N.D. Ill. 1923); *United States* v. *Mazzochi*, 75 F. 2d 497, 498 (2 Cir., 1935); *Murphy* v. *United States*, 285 Fed. 801, 816 (7 Cir., 1923), cert. den. 261 U.S. 617; *Bertsch* v. *Snook*, 36 F. 2d 155, 156 (5 Cir., 1929); *Powe* v. *United States*, 11 F. 2d 598, 599 (5 Cir., 1926); *Miller* v. *United States*, 4 F. 2d 228, 230-1 (7 Cir., 1925), cert. den. 268 U.S. 692; *United States* v. *Anderson*, 101 F. 2d 325, 333 (7 Cir., 1939), cert. den. 307 U.S. 625; *Ex parte Rose*, 33 F. Supp. 941, 942 (W.D. Mo. 1940).

[15] The case may be different where there is a charge that the conspiracy violates two separate conspiracy statutes. See, e.g., *American Tobacco Co.* v. *United States*, 328 U.S. 781, 787-8 (1946).

[16] *Sprague* v. *Aderholt*, 45 F. 2d 790, 792 (N.D. Ga., 1930), cited with approval in *United States* v. *Mazzochi*, 75 F. 2d at 498.

to accomplish two or more objects or to violate two or more criminal statutes,[17] or contemplates the addition or elimination of parties,[18] or is to be performed over a long period of time.[19]

Despite these well-established, albeit fairly unique, characteristics of conspiracy, the trial judge treated it as no different from a substantive offense (R. II: 896, 1009-10) where the same evidence may give rise to as many different offense categories as fit the evidence.[20] He conceded that his position—that two conspiracies under 18 U.S.C. §371 could arise out of identical facts—would be "extending the prosecutor's darling of a conspirator's count to an absurdity" (R. II: 1007) but he extended it just the same.

As the trial on the fifth count continued after the judgment of acquittal on the fourth count, there occurred a change in the theoretical justification for its survival. Under the prodding of the prosecutor, who was apparently concerned about equating absurdity with law, the fifth count became a separate and independent conspiracy of concealment beginning in 1946 but addressed "basically" to events which post-dated the filing of the Klein return in May, 1948 (R. II: 1010-12). In making the transition, however, he overlooked the fact that concealment was one of the purposes of the conspiracy charged in the fourth count and hence encompassed the very acts allegedly

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[17] See *Dowdy* v. *United States*, 46 F. 2d 417, 420 (4 Cir., 1931); *Tramp* v. *United States*, 86 F. 2d 82, 83 (8 Cir., 1936); *Moss* v. *United States*, 132 F. 2d 875, 877 (6 Cir., 1943); *May* v. *United States*, 175 F. 2d at 1002; *Frohwerk* v. *United States*, 249 U.S. 204, 210 (1919).

[18] *Lefco* v. *United States*, 74 F. 2d 66, 68-9 (3 Cir., 1934); *Norton* v. *United States*, 295 Fed. 136, 137 (5 Cir., 1924); *Hagen* v. *United States*, 268 Fed. 344, 346 (9 Cir., 1920), cert. den. 255 U.S. 569.

[19] *Braverman* v. *United States*, 317 U.S. at 52.

[20] See Kirchheimer, *The Act, The Offense and Double Jeopardy*, 58 Yale L.J. 513 (1949).

peculiar to the fifth count and that the fourth count, time-wise, encompassed the fifth count. The substituted approach was as erroneous as the original one for it is clear that the various stages in the unfolding of a continuous crime like conspiracy do not become separate crimes but merely evidence the one crime. If the facts reflect a single over-all plan, however diverse and sweeping its ramifications, they evidence only one conspiracy. See *Blumenthal* v. *United States*, 332 U.S. 539, 558-9 (1947) and notes 16 to 19 *supra*.

The record in this case demonstrates as clearly as one can ever expect that the fourth and fifth counts charge the same conspiracy, with the fifth count focusing principally on a part of it. On its face, the fourth count (R. I: 137) charges a conspiracy with several purposes: (1) to attempt to evade and defeat a large part of the income taxes due to the United States, with specific mention made of the taxes of the two Kleins, McLennan and Norgan, for the years 1944, 1945 and 1946; *and* (2) to conceal such attempts at evasion; *and* (3) to conceal the source and nature of the income arising from the sale of Harwood's *and* (4) to conceal the nature and source of the income of *all* the defendants (including Alprin, Roer and Koerner) for the years 1944, 1945 and 1946. The fifth count (R. I: 142), though it charges a conspiracy to defraud the United States by impeding the Treasury Department in the collection of taxes, specifies that it was to be carried out in the same way as objectives (3) and (4) above—by concealment of the nature of 'the defendants' business activities and of the source and nature of their income from the Harwood enterprise.

This common purpose of concealment was being pursued by the identical persons (since the alleged conspirators are the same in each count)[21] from 1943 to 1954, although

[21] The defendants in the fifth count are identical with those in the fourth, with the exception of Koerner and Roer. Koerner is named there as a co-conspirator, rather than a defendant. Roer is

for eight of those years (1946 to 1954), they were presumably pursuing the one purpose simultaneously in two separate conspiracies.

If additional evidence of the fundamental identity of the two conspiracies is necessary, it exists in plenty in the record below. The trial judge charged the jury that the crime in the fifth count was a conspiracy

> "to conceal from the Government, by various means and machinations, information relating to the nature of the defendants' business activities and the nature and source of their income to which it was entitled and to prevent the Government from determining by the ordinary processes of investigation and audit how much, if any, tax was owed by the defendants Klein, Alprin, Haas and the three Canadian defendants who are not before the Court" (R. IV: 2568).

This concealment of the business activities of the defendants and the nature and source of their income is precisely what the formation of Agencias and the purchase of the $1,500,000 in bonds was allegedly designed to accomplish, according to paragraphs 2 and 4 of the *fourth* count (R. I: 137, 138). And clearly, paragraph 17 of the *fourth* count alleges that the defendants were seeking to prevent the Government from learning "how much, if any, tax was owed" by Klein and the three Canadian defendants, the very thing they were charged with in the fifth count. (*Id.* at 140-1.)

Similarly, if overt act number 1, alleged in the fifth count,[22] is examined in the light of the evidence, it becomes apparent that it refers to the release of the drafts which

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not named as either defendant or co-conspirator but that omission was repaired by the Government when it offered his statements in evidence as those of a co-conspirator and the Court admitted them on that ground (R. II: 1168-9, 1194-5, 1335).

[22] R. I: 144.

had been held by Alprin since 1947 (*supra* pp. 6-7). The very same "holding" situation is referred to in overt acts 6 and 7 of the fourth count.[23] Clearly, the Tivoli transaction and the "manner of handling" the drafts were alleged as overt acts of concealment of the nature and source of the income of the defendants, designed to prevent the Government from learning the true tax liability of the defendants—and, equally clearly, they are alleged specifically in both the fourth and fifth counts.

There are many other rather clear indications that the objective of the fifth count conspiracy was also an objective of the fourth. They appear, for example, in the prosecutor's citation of identical acts as having been committed in furtherance of the two allegedly separate conspiracies.[24]

All of this is brought into sharp relief in the opinion of the court below. Discarding any pretense about a conspiracy of concealment beginning in 1946, as alleged in the fifth count, it frankly traces the purpose of concealment to the very origin of the relation between the parties (App. 7a), just as did allegation and proof on the fourth count. It points out that one reason the drafts were handled as they were was because the alleged conspirators "shared with H. H. Klein [a desire] to keep from the United States Treasury information which might lead it to conclude that he and the three Canadians had erroneously reported their income for the years 1944-1947. * * * H. H. Klein * * * was asking them to hold up use

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[23] R. I: 142 and *supra*, p. 7, n. 1.

[24] Each of the acts relied upon by the Government as having been committed pursuant to the fifth count conspiracy (R. II: 866-7) was referred to by the Government (in its memorandum resisting the motions for judgment of acquittal on the fourth count), as acts in furtherance of the conspiracy charged in the *fourth* count: e.g. (1) the transfer of the $8,000,000 (Govt. Memo p. 147); (2) the handling of the drafts (Id. at 152-3); (3) the entries in the Tivoli book (Id. at 149); (4) the rewriting of the Regan Potter book (Id. at 148, 154); (5) the making of statements to Internal Revenue officials (Id. at 149).

of the funds until his income tax liability was safely resolved." (*Id.* at 9a.) "The ultimate fact to be found" was "concealment and misleading," *Id.* at 20a, and the "income whose source and nature were being concealed was not primarily the drafts, but the Harwood's profits received much earlier by Klein and the three Canadians." (*Id.* at 21a.).

What appears from all of this is that the Government, now upheld by trial judge and appeals court, has sought to fashion two conspiracies out of a single course of events involving the identical parties, the identical, or almost identical, time period and a common purpose. For it is beyond question that the heart of the case against appellants was that they had set out in 1943 or 1944 upon a course of concealment of their operations—first through creation of sham corporations and, concurrently, through concealment of other phases of their activities—including the Tivoli transactions, the transfer of securities to Canada, etc. The fact that the Court concluded that one of these means of concealment of "the nature and source of income"—to wit, organization of sham corporations—was not proved by the Government would not authorize the rewriting of the fourth count to exclude from its reach the part of the course of concealment repeated in the fifth count. Indeed, the Court insisted it had done no such thing. At the close of its opinion on the motions for judgment of acquittal, the Court rejected the Government's suggestion that the defendants could be guilty under the fourth count "even though the taxes were never due" on the theory that the various acts of concealment constituted the conspiracy charged in count 4. He said that, if "the conspiracy count be tested independently of the substantive counts," it too must fall because of a failure of proof (R. II: 799-800).

From all that has been said above, one would have thought that a judgment of acquittal on the fourth count,

on the ground of insufficiency of evidence, would have determined the matter on the fifth count. The Court below, however, took a different position. It by-passed the questions discussed above and ruled that the constitutional prohibition of double jeopardy has no application to "differing dispositions of [two] counts of a single indictment at a single trial" (App. 24a).

Its position is based principally upon *Dunn* v. *United States*, 284 U.S. 390, 393 (1932).[25] Unlike our case, however, *Dunn* involved two counts, each charging *different* offenses, which went to the jury at the same time. There was an acquittal on one count, which was said to determine an issue common to both counts in such a way as to preclude conviction on the second count. Properly viewed, the case stands for the proposition that jury verdicts should be inscrutable, however irrational they may be. See *United States* v. *Coplon*, 185 F. 2d 629, 633 (2 Cir., 1950). It does not stand for the proposition that a judgment of acquittal by the *court* on the ground of insufficiency of evidence is no bar to a subsequent submission to a jury of the same

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[25] In addition to the *Dunn* case, discussed above, the Court of Appeals relied upon *Dealey* v. *United States*, 152 U.S. 539, 542 (1894) where the question was the effect upon certain counts of other counts on which there had been *no* verdict, and upon several variance cases. These last are cases where a single offense has been charged in several counts in different ways, in order to anticipate possible variance in proof. The withdrawal or dismissal of the counts not proved, even after the evidence is in, will not bar retrial of the count which did go to the jury if for any reason it does not proceed to judgment or is set aside on appeal. The reason for the exception is clear. Dismissal for variance is not an adjudication that the crime charged has not been committed. The distinction between such a situation and an acquittal on the ground of insufficiency of evidence is set out in *United States* v. *Wills*, 36 F. 2d 855, 856 (3 Cir., 1929). See *Berger* v. *United States*, 295 U.S. 78, 82 (1935). 22 C.J.S., *Criminal Law*, §268; *United States* v. *Hunter*, 123 F. Supp. 1, 2-3 (D. Md., 1954) and cases cited therein. Cf. *United States* v. *Harriman*, 130 F. Supp. 198 (S.D.N.Y. 1955). There can be no mistake about the fact that the judgment on the fourth count was an adjudication of insufficiency of evidence, not of variance.

offense charged in another count of the same indictment or in a consolidated indictment. See *Hughes* v. *United States*, 95 F. 2d 538 (5 Cir., 1938). The two situations are unquestionably different for the *Dunn* position clearly derives from the unique role of the jury in our legal system.

If we pass what we feel is an improper barrier placed by the Court below between the constitutional prohibition of double jeopardy and what transpired below, we find the issue to be: How final is a judgment of acquittal on the ground of insufficiency of evidence, entered pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure?

The finality of a judgment in a criminal case is governed by two separate doctrines which sometimes overlap, former jeopardy and res judicata. The differences are traceable first to the principle that jeopardy may attach, though there has been no judgment, while res judicata may never be invoked without a judgment; and second, to the principle that the plea of former jeopardy requires that the prior judgment must have been for the *same offense* as the one now being considered, whereas res judicata is available both where the prior judgment was for the same offense and where it was for a different offense. Anno., *Doctrine of res judicata in criminal cases*, 147 A.L.R. 991, 997 (1943); *United States* v. *Carlisi*, 32 F. Supp. 479, 482-3 (E.D.N.Y. 1940); 2 Freeman, *Judgments*, page 1364 (1925).[26] Thus, in a case like the present one, where it is contended that the prior judgment was for the same offense, concepts of res judicata are subsumed under former jeopardy and both are applicable.

Under established principles, "where a criminal charge has been adjudicated upon by a court having jurisdiction

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[26] Most criminal cases which speak in terms of res judicata involve situations where the prior judgment was for a different offense. See e.g., *Scalfon* v. *United States*, 332 U.S. 575, 578 (1948). Where the prior judgment was for the same offense, then the language of former jeopardy is customarily used.

to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offense. * * * the Fifth Amendment was not intended to do away with what in the civil law is a fundamental principle of justice * * * in order, when a man once has been acquitted on the merits, to enable the Government to prosecute him a second time." *United States* v. *Oppenheimer*, 242 U.S. 85, 88 (1916).[27] Cf. *Frank* v. *Mangum*, 237 U.S. 309, 333-4 (1915).

The prior judgment is a bar to a second judgment "in criminal prosecutions, as in civil cases, * * * [if] evidence competent and sufficient to sustain convictions under the second indictment would have been equally competent and sufficient to support a conviction on the indictment under which the defendant had been acquitted. If the inquiry must be answered in the affirmative, then the plea should be sustained. If, on the other hand, the evidence necessary to justify a conviction under the second indictment could not have sustained one under the first, the plea should be overruled." 2 Freeman, *Judgments*, pages 1370-1. This statement of the rule is identical with what has come to be known as the same evidence test for determining whether the offense charged in the second indictment is the same as that charged in a prior one. *Morgan* v. *Devine*, 237 U.S. 632, 641 (1915); *Gavieres* v. *United States*, 220 U.S. 338, 343 (1911); *In re Nielsen*, 131 U.S. 176, 187-8 (1889); *Tritico* v. *United States*, 4 F. 2d 664, 665 (5 Cir., 1925).

Since the conspiracy charged in the fifth count was part of that charged, litigated and adjudicated in the fourth count, the judgment of acquittal on that count should have barred further litigation of the matter. This is true even

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[27] Compare: "Where the cause of action in the second action is the same as that in the first action, a final judgment in the latter upon the merits is a complete bar to the maintenance of the second action." 2 Freeman, *Judgments*, pp. 1428-9.

though the trial judge may have misplaced his emphasis upon the tax evasion aspects of the fourth count. For it is clear that, despite a conclusion that the tax evasion objective of the fourth count conspiracy had not been proved, there could still have been submitted to the jury under the fourth count the issue whether the concealment objective was part of the conspiracy. The fact is that it was not so submitted and that constituted an end of the matter. The principle is clear that, though a conspiracy may be charged as consisting of an agreement to commit several offenses, proof that only one was agreed upon is sufficient to take the case to the jury. *United States* v. *Baker*, 61 F. 2d 469, 470 (2 Cir., 1932), cert. den. 288 U.S. 602; *Short* v. *United States*, 91 F. 2d 614, 622 (4 Cir., 1937); *McWhorter* v. *United States*, 62 F. 2d 829, 830 (5 Cir., 1933). Proof sufficient to support the fifth count was, therefore, sufficient to support the fourth. This, without more, establishes the identity of the charges in the two counts.

There is yet another principle supporting a conclusion that the two counts charged the same offense and hence that a judgment of acquittal of one barred prosecution of the other. Since the fourth count conspiracy covered eleven years, during eight of which years the fifth count conspiracy was allegedly going on for the same objective, it follows that a judgment of acquittal for the longer period bars further trial for the lesser included period. *Short* v. *United States*, 91 F. 2d at 620; Housel and Walser, *Defending and Prosecuting Federal Criminal Cases*, pages 417-18 (1946). See cases in note 14a *supra*.

From the moment the judgment of acquittal was rendered on the fourth count (embracing the fifth, as it did), there began a violation of the principles of former jeopardy and res judicata. There followed many weeks of trial on the very offense of which the defendants had already been acquitted. During this entire process, there took place the very harassment, multiplicity of prosecution and unwarranted

exposure to legal penalty which the guarantee against double jeopardy forbids.

It is respectfully submitted that when two counts charge the same offense and the trial judge has acquitted on one of them, the acquittal bars any further trial. This principle is especially important where the offense is conspiracy. For the very looseness of that concept makes it a device which can easily be manipulated by a cynical prosecutor, with the constitutional prohibition of double jeopardy left a shambles in the process. It is submitted that the consistent reliance by prosecutors upon the conspiracy count makes this a recurring and serious problem in the administration of justice in the federal courts.

III.

Where gist of offense is concealment of information from Treasury, it is error to refuse to charge jury on nature of duty to disclose such information.

The trial judge denied a request for instruction which sought to place before the jury the principal issue upon which Alprin's defense depended.[28] He refused to define

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[28] Alprin's S-24 (R. IV: 2417) reads:

"The test of the taxability of income in a given year is whether it is made unconditionally available to the taxpayer in that year. If he has the right and the unrestricted opportunity to do what he wishes with the income—if he is free to enjoy it at his own option—then it is taxable to him. But the converse is also true. If its availability to him is conditioned or restricted, whether orally or in writing, he is under no obligation to report it until such condition or restriction is terminated. [Citing cases.]

"You are instructed that if you believe that the defendant Alprin received his bank draft from Tivoli, through Klein, subject to a restriction as to its use, and therefore, did not have funds under his dominion and control and could not use the funds as he wished because of the restriction, then you must find that it was not income taxable to him for as long as such restriction continued. If you find that the restriction on use continued from 1947 to 1952, then, during each of those years, there was no obligation on his part to deposit

the legal criteria which would have enabled the jury to determine whether the manner in which Alprin handled the Tivoli drafts—particularly his failure to report them as income from 1947 to 1952—was in some way unlawful. Only if the jury knew that funds which, though in one's possession, may not be used because of a complete restriction on their use, are not reportable as income until the restriction is removed,[29] could it have properly assessed Alprin's justification for his holding of the Tivoli drafts. And only if it made that assessment could it determine Alprin's guilt or innocence here, for the holding was central to the theory on which the trial judge gave the case to the jury. He told them that, regardless of the inconsistent claims of Klein and Rokoff, on the one hand, and Alprin, Roer and Koerner on the other, as to whether the drafts were commission payments or gifts or liquidating dividends, they

> "could find that the manner of *handling the payment of those sums* was part of an overall plan by the defendants and co-conspirators to conceal from the

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> the draft in a bank or to report the receipt of the draft in his income tax return. If you so find, then Alprin's failure to report the bank draft as income could not be part of a conspiracy to defraud the United States in the exercise of its tax collection function. [Citing cases.]"

[29] Taxable income is "income that is subject to a man's unfettered command and that he is free to enjoy at his own option." *Corliss* v. *Bowers*, 281 U.S. 376, 378 (1930). It becomes taxable when the recipient "derives readily realizable economic value from it. * * * That occurs when cash [or check or bank draft] * * * is delivered by its owner to the taxpayer in a manner which allows the recipient freedom to dispose of it at will." *Rutkin* v. *United States*, 343 U.S. 130, 137 (1952). If the funds are received subject to a complete restriction on their use, there is no obligation to report them as income until the restriction is terminated. *Fischer* v. *Comm'r of Internal Revenue*, 14 T.C. 792, 802 (1950). See also *Hedrick* v. *Commissioner of Internal Revenue*, 154 F. 2d 90, 91 (2 Cir. 1946); *North American Oil Co.* v. *Burnet*, 286 U.S. 417, 424 (1932); Int. Rev. Regs. 118, §39.42-2 (1939); 2 Mertens, *Law of Federal Income Taxation*, §10.01.

United States Treasury Department the facts, whatever they were, so that the true income tax liability, if any, of the defendants might not be ascertained. * * *

"You could find that there was an understanding that they were to be held pending the determination of the tax consequences of the syndicate's operations. * * *

"Now, if you find that there was such a deliberate and evil agreement or concert of intention on the part of the alleged co-conspirators as is charged in the indictment and that the *handling of these quarter million* dollar payments was an intentional act done in furtherance thereof, you may find such, if any, of the defendants as were co-conspirators guilty as charged in the indictment" (R. IV: 2575-6). (Emphasis supplied.)

Clearly, a key issue in the case was whether it was lawful for Alprin to fail to report his draft, or the proceeds thereof, as income until 1952.[30] The denial of an instruction on the impact of a restriction on use of funds upon their reportability, in these circumstances, could not but have been prejudicial to Alprin.

The denial takes on even greater significance, however, when it is related to the crime with which appellants were charged. They were tried for conspiracy to defraud the United States, one of the most widely used but least well understood weapons in the federal prosecutor's arsenal. It combines under one head two of the vaguest categories known to federal criminal law. Though the loose and

[30] The Court stated that the "holding" situation was the "basis upon which I refused to grant a judgment of acquittal on the fifth count" (R. II: 1177). See also the Court's opinion on the Motions for Judgment of Acquittal, R. II: 800 et seq.

sprawling nature of the conspiracy concept has been recognized on many occasions,[31] less attention has been devoted to the particular species of conspiracy involved here.

Unlike the first half of the conspiracy statute which requires that the object of the conspiracy be an "offense against the United States" and thereby introduces the specificity of the statute creating the "offense," the second half—conspiracy to defraud the United States—is a self-contained unit. Here, there is no built-in specificity of a substantive statutory offense which provides the terms of the criminal agreement. The object of this brand of conspiracy need not be a crime. It need only involve "defrauding." But any illusion that that is a term rich in legal definition is immediately dispelled when we learn that the word "defraud" is not given its common law meaning. There need be no pecuniary or property loss whatever, either actual or contemplated. In point of fact, the crime of conspiracy to defraud the United States has been expanded so that it makes criminal all agreements which seek to interfere with, or obstruct, any lawful functions of the Government, *Haas* v. *Henkel*, 216 U.S. 462, 479-80 (1910), so long as the conduct involves "deceit, craft, or trickery, or at least * * * means that are dishonest." *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924).

In a society where the functions of Government have become co-extensive with the functions of life itself, such an offense category tends to become the very negation of that principle of legality which has been the pride of our criminal law: The requirement of notice in advance of the elements of conduct condemned as criminal. See Hall, "The Principle of Legality—Nulla Poena Sine Lege,"

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[31] Jackson, J., concurring in *Krulewitch* v. *United States*, 336 U.S. 440, 445 (1949); Rutledge, J., dissenting in part in *Pinkerton* v. *United States*, 328 U.S. 640, 650 (1946). See Sayre, *Criminal Conspiracy*, 35 Harv. L. Rev. 393 (1922).

in his *Principles of Criminal Law*, pages 19 et seq. (1947); cf. *Screws* v. *United States*, 325 U.S. 91, 107 (1945). Without such notice, there is left to the whim of the individual judge or jury the definition of the offense and there is imported into federal law a statutory equivalent of the common law misdemeanor. See *Commonwealth* v. *Mochan*, 110 A. 2d 788 (Pa. Super. 1955).

Given so loosely defined a crime, it becomes of the utmost importance to assure that the jury is told with as much precision as is possible under the circumstances the legal standards which are to govern its deliberations. *Williams* v. *United States*, 131 F. 2d 21, 23 (D.C. Cir., 1942). "In a criminal case a court should instruct on all essential questions of law involved in the case, whether requested or not." *Kreiner* v. *United States*, 11 F. 2d 722, 731 (2 Cir., 1926); *Screws* v. *United States*, 325 U.S. 91, 106-7 (1945); *Tatum* v. *United States*, 190 F. 2d 612, 615-16 (D.C. Cir., 1951). What is an essential question is ordinarily determined by referring to the elements of the offense and to the defenses raised at the trial. The "theory of the defendant must be stated clearly and completely. * * * A charge is erroneous if it ignores a defense claimed as to which there is evidence before the jury." *Smith* v. *United States*, 230 F. 2d 935, 939 (6 Cir., 1956).

Here, the crime charged was conspiracy to defraud the United States by interfering with the income tax collection functions of the Treasury Department. Under the cases, it is essential that the governmental function interfered with be a "lawful" one, and that the interference be accomplished by means of "deceit, craft or trickery or at least by means that are dishonest." *Hammerschmidt* v. *United States*, 265 U.S. at 188. The crime, therefore, requires an agreement which contemplates deceiving the government with regard to something to which it is entitled. Deceit, by definition, involves either a misrepresentation made to someone or a concealment of something from someone who has a right to know it. Since the

fifth count charged concealment from Treasury of the nature and source of the income of the defendants and, as regards Alprin, focused principally on "the manner of handling" the bank drafts, the question for decision by the jury was whether Alprin concealed the existence of those drafts from someone who had a right to know of them.

The entire thrust of Alprin's S-24 was to get the judge to equip the jury for its job. Without it, the jury had no way of knowing whether the bulk of the alleged acts of concealment ascribed to Alprin were in fact concealment or were merely inaction where no action was required. It could not have known that if there was in fact a restriction on the use of the bank drafts representing the quarter-million dollar payments,[32] then undisputed case law and administrative regulation hold that there is no obligation to report the amount so received as income. See note 29 *supra*.

What did the judge tell the jury about the obligation of disclosure under the circumstances here? He told the jury that it was to ascertain whether the defendants had conspired "to conceal from the government * * * information to which it was *entitled* * * *" (R. IV: 2568); whether they had so arranged their records and affairs and so filed tax returns "as to deceive and delude the tax authorities when and if the authorities should seek to ascertain and verify the liability for income taxation of the defendants" (R. IV: 2571). The Court stated that though "there is no obligation on a taxpayer to volunteer information which might invite a searching analysis of his and his associates' transactions for the purpose of ascertaining or verifying tax liability," there is an obligation on such persons "to demean themselves honestly and not to conceal from the tax authorities the business re-

[32] The existence or non-existence of a substantial restriction on use is a question of fact to be resolved by the fact-finder. 2 Mertens, *supra*, §10.02, p. 5.

lationships of such persons and the nature and source of their income" (R. IV: 2571).[33]

The issue thus posed by the Trial Court was: Was the defendant Alprin under an obligation to call certain facts to the attention of the Treasury Department? Quite obviously, if there were no obligation to call facts to the attention of Treasury, there could be no concealment in withholding such facts. Yet, the only attempt made by the court to guide the jury on this question of "right" and "obligation" fell far short of even a minimal explanation of what was involved in the case. Thus, the Court told the jury that

> "The United States in performing its governmental function of assessing and collecting income taxes, *is under our law entitled to the economic facts upon which the proper tax is to be computed. It is the duty of everyone in our country to supply those facts as required by law*" (R. IV: 2575).

Again, he said,

> "*Except where disclosure is required by proper legal authority,* every person and every corporation is entitled to maintain the privacy of his or its business, books, papers and documents and to prevent others from inspecting them" (R. IV 2582). (Emphasis supplied.)

The references to information to which the government was "entitled," with regard to collection of taxes "rightfully due" (R. IV: 2555), in order to permit the exercise of a "lawful" governmental function (R. IV: 2570); the further reference to a "duty of everyone * * * to supply those facts as required by law"—all coupled with the right to maintain the privacy of one's affairs "except where disclosure is required by proper legal authority" portend an

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[33] Other references, in like vein, are to be found throughout the charge.

explanation of what an individual may keep to himself—particularly with regard to the "holding" of the Tivoli payments. But that explanation is not to be found anywhere in the charge.

It is respectfully submitted that the Court committed reversible error when it refused to charge the jury as requested in Alprin's S-24.[34] That request sought to give content to the central issue in the case, certainly as regards Alprin—whether the "manner of handling" the Tivoli payments was "only that which the law allowed."[35] Without such content, the case went to the jury with an invitation to convict on speculation and conjecture.

The failure of the trial judge to charge on the law applicable to the holding of the money was symptomatic of a deeper seated malaise—one which is peculiarly likely to exist in a conspiracy to defraud case. Despite the vast amount of evidence in the record and the variegated transactions upon which they touched, there was virtually no attempt made in the charge to focus on any of them. The case was given to the jury on a shadow theory: that it could determine whether the assorted activities of all these people over so many years were sufficiently suspicious as to have had for their purpose the concealment of information from the Treasury Department. The result is to expand the crime of "concealment" from the Govern-

[34] Counsel for appellant Alprin sought several times subsequent to the submission of these requests to apprise the Court of the glaring omission in its charge. Thus, after the Court had denied Alprin's S-23 and S-24 "except as adequately covered elsewhere in charge" (R. IV: 2443), counsel for Alprin asked the Court on two occasions to reconsider its denial, since the request was not "covered elsewhere"—once in order to obtain guidance as to the principles of law which could be referred to in summing up to the jury (R. IV: 2446 et seq.); and a second time after the Court had given its charge but before the jury retired (R. IV: 2596). On both occasions, the Court refused to charge on the matter encompassed by S-23 and S-24.

[35] See Alprin's S-23 (R. IV: 2416). See also *United States* v. *Bays*, 211 U.S. 507, 517 (1909); *United States* v. *Atlanta Journal Co.*, 185 Fed. 656, 662 (C. Ct. Ga., 1911).

ment—which is synonymous with omission of that which one has a duty to disclose—to hitherto unprecedented dimensions. Such expansion, coming as it does at the end of a line of cases which have taken the crime of conspiracy to defraud the United States far beyond what anyone using those words contemplated, deserves serious consideration by this Court.

IV.

Proof of three conspiracies where one is alleged is prejudicial error in a complex case unless conditions set in *Kotteakos* v. *U. S.* are satisfied.

At the close of the Government's case, the defendants moved for judgment of acquittal on all counts. This motion was granted as to the first four counts but denied as to the fifth. A lengthy opinion was written by the trial judge setting forth, inter alia, three hypotheses which were, in his view, supported by the evidence and hence deserving of submission to the jury. The hypotheses resulted from the contradictory stories told by Klein and Rokoff, on the one hand, and Roer, Koerner and Alprin on the other, as to the nature of the Tivoli bank drafts delivered to Alprin et al. in March, 1947, and from the "holding" of the drafts for a number of years without reporting them as income.

The first hypothesis was that

> "a reasonable person could conclude on the record that these funds were a liquidating dividend as claimed by Koerner, Alprin and Roer. If that is so, then at least Klein and the co-conspirator Rokoff conspired to label these funds in the books of Tivoli falsely, i.e., as commissions" (R. II: 803).

Under the second hypothesis, it might appear "that the defendant Alprin at least fraudulently stated, as did Koerner and Roer, that these funds were other than ordinary income when Roer filed his return in 1950 and Koerner and Alprin filed theirs in 1952"; and that

"the misbranding of these funds in the 1950 Roer return and the 1952 Koerner and Alprin returns was the product of a combine of the seven named defendants and the three named co-conspirators" (R. II: 804).

Under the third hypothesis, the jury could conclude that all else, together with "the unusual, to say the least, impounding of these substantial funds," evidenced that

"a purpose other than that claimed by either side of the dispute as to the character of this money was the fact and that it was to be given the appearance of a legitimate expenditure until the conclusion of Klein's then income tax difficulties after which it would be disposed of in some manner to be agreed upon by the parties. If so, all defendants named in the count could well be found to have participated in a conspiracy to thus throw sand in the Government's eyes in the performance of its functions respecting income taxes." *Ibid.*

It seems clear that the first hypothesis involved only Klein and Rokoff and had as its purpose the exact opposite of what Alprin et al. were allegedly conspiring to do under the second hypothesis. And though the third hypothesis could involve the same parties as the second, it did not involve the same purpose. It concerned itself with the withholding of information from the Government for some unknown purpose.

Despite the denial of the motions for judgment of acquittal on the ground that reasonable men could convict on any one of the three hypotheses, the Court submitted the case to the jury on only one of them—the third.[36] This

[36] The Court below took much the same view as did the trial judge. In discussing "The Prosecution's Alternative Patterns of Facts Concerning the Nature of the Tivoli Drafts," it more or less repeats the three hypotheses. For example, with regard to the first hypothesis, the Court says "The conspiracy to defraud the Trea-

was in plain disregard of *Kotteakos* v. *United States*, 328 U.S. 750 (1946) where this Court set out in some detail the procedure to be followed if prejudicial error is to be avoided in cases of variance between allegation and proof.

Both trial judge and appeals court seek to deny the bearing of *Kotteakos* upon this case by asserting that there was no variance from the allegation of one conspiracy. Both insist that three "hypotheses" or "patterns of fact" do not make three conspiracies. In this, it is submitted, they are clearly wrong. If, under the evidence, A and B could have had purpose X, C and D could have had purpose Y and A, B, C and D could have had purpose Z, then we have a classic illustration of three separate conspiracies engaged in by some or all of the same persons, but each having a different objective. The words "hypothesis" and "pattern" thus become another way of rationalizing the evidence in terms of the unlawful purpose which gives definition to any conspiracy.

Although proof of several conspiracies where only one is alleged no longer calls for automatic reversal of a conviction, if the variance affects "the substantial rights of the accused," then the conviction will be reversed. *Kotteakos* v. *United States*, 328 U.S. 750, 756-7, 766 (1946); *Berger* v. *United States*, 295 U.S. 78, 82 (1935); *Brooks* v. *United States*, 164 F. 2d 142 (5 Cir., 1947); *Canella* v. *United States*, 157 F. 2d 470, 477-8 (9 Cir., 1946).[37]

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sury, under this version of facts, was carried out by Klein and Rokoff" (App. 11a). Under the second "pattern of facts," Klein "could not be considered a party to a scheme by Roer, Koerner and Alprin" (App. 13a). And as to the third "pattern," "they could still be parties to Klein's plot to conceal the payments," *ibid.*, i.e. "that they were to be given the appearance of a legitimate corporate expenditure until Klein's tax difficulties were over" (App. 30a). But yet the Court below agreed with the trial court that this did not make for more than one conspiracy.

[37] Compare the opinions of the Court below in cases prior to this Court's decision in *Kotteakos*. See e.g. *United States* v. *Liss*, 137 F 2d 995 (2 Cir., 1943); *United States* v. *Cohen*, 145 F. 2d 82, 89 (2 Cir., 1944).

The *Kotteakos* case is controlling here. It arose upon an indictment charging a single conspiracy involving a great many participants. This Court held that the proof of several conspiracies in such a case was so prejudicial that reversal of the convictions was warranted. It relied particularly upon the complexity of the case and the difficulties posed for the jury by a charge based upon a single conspiracy theory. Pointing to the dangers attendant upon the trial judge's submission of the case to the jury on such a theory, as was done below (R. IV: 2567, 2563-4), this Court said:

> "On those instructions it was competent not only for the jury to find that all of the defendants were parties to a single common plan, design and scheme where none was shown by the proof, but also for them to impute to each defendant the acts and statements of others *without reference to whether they related to one of the schemes proven or another and to find an overt act affecting all in conduct which admittedly could only have affected some.*" 328 U.S. at 771 (Emphasis supplied).

So, in the present case, the trial judge could not, in his charge, summarily disregard two of three conspiracies. He had an obligation to tell the jury how to determine the applicability of the various acts and declarations to each conspiracy. Otherwise, acts or declarations pursuant to the first or second conspiracy could have been used by the jury to find the third conspiracy, even though such acts or declarations were separable from that conspiracy in time or purpose.

Counsel for petitioner Alprin offered a series of requests for instruction[38] which were a comprehensive attempt to eliminate the prejudicial effect of the variance between allegation and proof. They proceeded from the premise that

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[38] Alprin's S-11 to S-26 (R. IV: 2411-19).

the only method by which such prejudice could have been avoided in this case—if it was possible at all—would have been for the Court, in its charge to the jury, to describe the three or more conspiracies which could have been found by the jury and to segregate law and fact applicable to each.

Particularly important was Alprin's S-12, which would have instructed the jury to consider "the evidence relating to each conspiracy alleged and the overt acts or admissions or declarations produced with reference to each separately from that relating to each other conspiracy charged." (R. IV: 2412.) Such a "precautionary instruction" was said in *Kotteakos* v. *United States*, 328 U.S. at 769, to be "appropriate, perhaps required in cases where related but separate conspiracies are tried together * * *." Here, as in *Kotteakos id.* at 770, the trial court did charge the jury to consider each defendant's case separately, in determining his participation in the *one* conspiracy (R. IV: 2548, 2565). But neither here nor in *Kotteakos* could such an instruction be said to keep "distinct conspiracies distinct, in view of the court's conception of the case." 328 U. S. at 770.

It is respectfully submitted that the variance here was hopelessly prejudicial, just as it was in *Kotteakos*. Though that case involved more parties, it did not involve as complex a subject matter or as long a trial. Certainly, it cannot be said that there existed here that "factor of shortness and simplicity—and of consequent ease of comprehension by the jury" which is the key to the existence of prejudicial error in this class of case. Judge Frank, dissenting in *United States* v. *Liss*, 137 F. 2d 995, 1004 (2 Cir., 1943). This was one of the longest trials of a criminal case in the memory of any of counsel trying it. It continued for almost five months and resulted in a transcript of over 9,000 pages and some 400 exhibits. Even in the ordinary conspiracy case, the sifting of acts and declarations of individual conspirators and the allocation thereof as being in furtherance of the conspiracy is an almost impossible

task. How much more so in a case of this magnitude! Even the most skillful lawyer or judge must inevitably pause when confronted with the herculean task of tracing the lines of three conspiracies through so massive a record. But when a jury is asked to do it without any effective guidance by the trial judge as to what conspiracies could be found under the evidence and by what standards, we have a hopelessly prejudicial situation.

These strictures are of the utmost importance here, for in conspiracy cases, far more than in others, "the instructions often become * * * [a defendant's] principal protection against unwarranted imputation of guilt from others' conduct." *Kotteakos* v. *United States*, 328 U.S. at 776-7. The loose and sprawling offense which is conspiracy can be kept within bounds only if this Court is willing to enforce strict rules of trial management. The failure to adhere to such rules below raises an important issue in the administration of justice in the federal courts.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

F. Joseph Donohue
Abraham S. Goldstein
503 D St., N.W.
Washington, D. C.

Michael Kaminsky
122 East 42nd St.
New York, N. Y.

Attorneys for Petitioner Alprin

November 1, 1957.